United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1422

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
Richard A. Greenberg

B
P/S

UNITED STATES OF AMERICA,

Appellee,

-against-

WALTER SWIDERSKI,

Appellant.

Docket No. 75-1422

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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QUESTIONS PRESENTED

1. Whether the testimony of the paid Government informer, uncorroborated on the critical issue of entrapment, warranted a special instruction to the jury to scrutinize it carefully, and whether the district court's failure to give such a charge, despite a defense request, requires the reversal of appellant's conviction.

2. Whether the trial court's charge on entrapment erroneously required appellant to meet a burden of proof which was not his to carry.

3. Whether the trial court's refusal to instruct the jury at appellant's request that there was no evidence that the defendants had threatened the informer was prejudicial error.

4. Whether the cumulative effect of the errors discussed in POINTS I, II, and III was to deprive appellant of a fair trial.

5. Whether the fact that the Government informer not only supplied appellant with the contraband by arranging a transaction with a narcotics dealer to whom appellant otherwise had no access, but did so on a contingency fee basis, exceeded the limits of permissible Government conduct and requires a judgment of acquittal as a matter of law.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Dudley B. Bonsal) entered on December 8, 1975, after a jury trial, convicting appellant Walter Swiderski of possessing 21.5 grams of cocaine with intent to distribute, in violation of 21 U.S.C. §§812, 841(a)(1) and (b)(1)(A). Appellant was sentenced pursuant to 18 U.S.C. §3651 to a two year term of imprisonment, six months of it to be served in a jail-type institution, and the execution of the balance suspended, with concurrent three year terms of probation and special parole following his release from confinement.

Appellant was permitted to remain free on $1500 personal recognizance bond pending appeal, and The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal by this Court, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

Appellant Walter Swiderski and his fiancee, Maritza De Los Santos, neither of whom had any prior criminal record (196, 300)*, were indicted ** on August 8, 1975, in the Southern District of New York on charges of possessing with intent to distribute 21.5 grams of cocaine and 7.6 grams of marijuana on June 3, 1975, in violation of 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), and 18 U.S.C. §2. Appellant

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* Numbers in parentheses refer to pagination in the transcript of appellant's trial, dated October 21-23, 1975

** The indictment (75 Cr. 797) is "B" to appellant's separate appendix.

and his co-defendant were tried together before the Honorable Dudley B. Bonsal and a jury, the proceedings commencing on October 21, 1975. Although the Court dismissed the marijuana charge as to appellant at the close of the evidence (323), appellant was found guilty of the cocaine possession count on October 23, 1975, while his fiancee was convicted on both counts.* On December 8, 1975, appellant was sentenced pursuant to 18 U.S.C. §3651 to two years imprisonment, six months of that time to be spent in a jail-type institution, and execution of the remainder suspended, with concurrent three year terms of probation and special parole to follow his release from confinement. His co-defendant, whom he had married on October 25, 1975, (467), received the same sentence.

The Trial

The Government's case was based upon the testimony of a 29 year old, "handsomely paid"** informer named Charles Martin Davis, who was characterized by the prosecutor himself in his opening and closing remarks to the jury as "not a model citizen," "a paid headhunter," "not a nice guy" (14, 359). Appellant's defense was one of entrapment.

A. The Government's case

Davis, who had been selling marijuana, became worried during the summer of 1973 over the severe new drug law enacted

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* Notwithstanding the jury's verdict, prior to sentencing, the Court also dismissed the marijuana count as to appellant's co-defendant (462).

** This was the prosecutor's own phrase (12).

in New York, effective September 1, 1973, which provided life sentences for narcotics dealers (25, 75-77). Upon learning that a 16 year old had informed upon him, Davis approached the New York City police in August and spoke with a Sergeant Egan, telling him about his prior narcotics activity (25-26, 75-76). Davis was asked if he would co-operate with the police, but when he demanded "monetary reward" for doing so and was told that the New York police had no money, he declined to co-operate (27, 78-79). Two months later, however, in November, he was approached by two agents of the Federal Drug Enforcement Administration (DEA) who again asked Davis to co-operate, telling him that "the federal government had more money than the city" (27-28). Since Davis was "broke" and believed that he "could make a lot of money in a very short time," he now agreed to co-operate (80).

Davis was paid according to the number of cases he could "make" - "The more cases [he] made the more money [he] would make"(81). He received $150 each time he introduced a federal agent to a narcotics dealer who sold heroin or cocaine to the agent, and received additional money for "intelligence" he provided or if a seizure of narcotics was made (29, 32, 80-81). In February, 1975, finding that he had not been "too successful," and that he was again "broke" and in debt, Davis began receiving a salary of $210.00 per week which was "reviewed every month based on [his] success-

fully co-operating" with the DEA (82-83). In addition to his salary, Davis received a "reward" if large seizures of narcotics were made (83). Davis received his last payment from the DEA in August, 1975, and had earned in all approximately $16,000 ($10,000 of it in cash) for his not-quite two years of service (29, 31). Except for two or three weeks as a taxi driver, Davis' income during this period, on which he paid no taxes, was derived entirely from his services as an informer (29-30, 87, 119).

Davis testifed that while he had met appellant before beginning to work for the DEA, de did not speak to appellant until he began informing (34). In November or December, 1973, according to Davis, appellant approached the informer at a "light show" in Greenwich Village where Davis was working without pay, and told Davis he was selling "THC," a hashish derivative (38-40, 91-92). Davis testified that appellant gave him one capsule, which Davis tried, resulting in a "psychodelic kind of trip," and that appellant asked him to help find people to buy the drug (40-41). From that time until May 31, 1975, a period of a year and a half, Davis testified that he met frequently with appellant and discussed with him the possibility of narcotics transactions between them -

> He would tell me the things that he had to sell and I expressed like an open interest in the possibility of us doing business if the prices were right and the quantities were right and if it met the guidelines that I was told to follow by the [DEA].
>
> (41-42)

During this period, however, Davis admitted that he had never purchased drugs from appellant (98), and there was no testimony by Davis that he had ever seen appellant sell drugs to anyone else.

On Saturday, May 31, 1975, according to Davis' testimony, appellant called and told him that he wanted to come to New York that night to buy a "quarter of cocaine," which meant a quarter of an ounce (42-43). When appellant arrived later at Davis' room in the Chelsea Hotel, Davis testified that appellant actually wanted to buy a quarter of a pound of cocaine, and he produced $3,000 - $4,000 to show he was serious (43). Appellant said it was his birthday and therefore expected Davis to arrange such a purchase as a favor as soon as possible (43). There were other narcotics dealers present in Davis' room who, upon seeing appellant's money, tried to sell him "speed," but Davis claimed that appellant only wanted to buy cocaine (43-44).

After everyone else left, Davis called Special Agent Tom Fekete, Davis' contact at the DEA, and told Fekete of appellant's desire to purchase cocaine. Fekete told Davis to stall for 24 hours until Monday, when Fekete would let him know what the DEA had decided (44). Davis testified that on Monday, Fekete approved a transaction, indicating that appellant would be seized with the narcotics after he had made the purchase (45). The person to whom Davis planned

to introduce appellant was a narcotics dealer named Carlton Bush, who was so "cautious" that Davis could not introduce a narcotics agent to him (45). Davis called Bush's representative, Gene Casey, through whom he secured Bush's assent for the transaction (45-46). Davis then called appellant, telling him that the deal was arranged for the next day, June 3rd, and that appellant was expected to pay $4,600 for four ounces of coaaine (47-48). Davis testified that while appellant said "Great" upon learning of the news, he also warned that he would go to other "connections" he claimed to have if the deal did not go through quickly (47).

On June 3, 1975, at approximately 3:00 p.m., appellant arrived at Davis' hotel room with his fiancee, the co-defendant Maritza De Los Santos, whom Davis knew from calling appellant's house and talking with Maritza when appellant was not at hime (48, 129-130). Davis testified that appellant showed him a large stack of bills in Maritza's presence (48-49).

After picking up a man named William, who knew Bush and who was waiting in the lobby of the hotel, Davis and the two defendants drove to Bush's apartment at 58 West 48th Street in appellant's van (50-51). All four of them entered Bush's apartment, where Bush and Gene Casey were waiting (51). Davis testified that appellant had never met Bush before that day and had no other access to Bush except through Davis (98-99).

When Bush indicated that he wanted the deal to proceed as quickly as possible, Davis signalled to appellant, who joined Bush and Davis in a bedroom alcove of the apartment where Bush gave appellant a package of cocaine (51-52). After asking the price, appellant called to Maritza to come into the room, and both of them proceeded to test the cocaine in various ways - "snorting" it, burning it, and applying bleach to it (52-53). Davis testified that after these tests were completed, appellant asked Maritza, "what do you think, should we buy it?", to which Maritza replied that, while it was not good enough for their own personal use, they had someone else ready to buy that cocaine and more, whereupon appellant agreed to buy the cocaine (54). Bush, however, had only one ounce available then, and the defendants agreed to return at 6:00 p.m. to purchase another three ounces (55). After the defendants gave Bush $1250 for the one ounce, and appellant told Bush that he could take another half pound of cocaine in a few days, Davis and the two defendants left the apartment (55, 57-58). Before dropping off Davis again at the Chelsea Hotel, the defendants indicated they were going to sell the ounce of cocaine they had just bought (58). Shortly after the defendants drove away, Davis was picked up by Agent Fekete, to whom he told what had just occurred (59).

On cross-examination, Davis testified that while he spoke by telephone with appellant at least once a day between May 31, and June 3, no monitoring or recording of those calls was undertaken (100-102). Also, on cross-examination, appellant's trial counsel elicited from Davis that he had received $3,000 in payment from the DEA after June 5, 1975, as a final settlement. During this questioning, Davis volunteered that his "salary lapsed at the end of June and I was put in a hotel for my safety" (103). On re-direct examination, the prosecutor asked Davis:

> Did you subsequently confer with [the agents] once you rented the room there as to whether it was <u>safe</u> to live in the Chelsea Hotel?
>
> (130, Emphasis added)

Over appellant's objection, and while later acknowledging out of the jury's presence that the defendants were not responsible for any threats to the informer (132, 152, 352), the prosecutor was permitted to continue with this line of questioning, concluding with the question: "Let me ask you, during that period of time, had your life been threatened?" (131). The Court this time sustained appellant's objection, remarking at side bar that "I don't think we need to get into this at all" (132). Moreover, while the Court denied appellant's motion for a mistrial based on counsel's view that "the jury has been left with the impression that these defendants did make threats" (132,152), the Court nevertheless assured counsel that:

> I will straighten [the jury] out on that. If it doesn't happen before, I will straighten it out on the charge. I will tell them there is no evidence of any threats.
>
> (152-152, Emphasis added)

In their requests to charge, counsel reminded the Court of this assurance and requested that such an instruction be given (351-354). The Court, however, refused and failed to instruct the jury in any way concerning the issue of threats. When exception was later taken to this failure, the Court reiterated its belief that:

> The jury has forgotten all about it, really, and I don't see any point in raising it because everytime you raise it you don't know what the reaction is to the jury.
>
> (354, 446, 447)

In addition to Davis, Gerald Lino and Robert Lamireta, two New York police officers assigned to the DEA, testified for the Government. On June 3rd, dressed in plainclothes, they conducted a surveillance at the Chelsea Hotel, saw the two defendants drive from the hotel in the company of two other males, followed appellant's truck to 58 West 48th Street, saw the four enter the building, waited a half hour, and then saw the two defendants and Davis leave the building. The two officers followed appellant's truck back to the Chelsea Hotel, where they saw Davis alight. Upon receiving a transmission from Agent Fekete, the two officers followed the van as it proceeded up 8th Avenue and, as it turned east on 34th Street, they stopped it by swerving their

car in front of the van while another Government car pulled in behind it (Lino, 134-137; Lamireta, 177-178). As the officers ran towards the van with their guns drawn, calling out "Police,"* appellant unsuccessfully sought to drive away, hitting the vehicles parked in back and in front of him four or five time (Lino, 137-138, 163-164; Lamireta, 179, 182-183).** Appellant and Maritza were then arrested. The officers seized Maritza's purse in which they found a pouch containing the cocaine and $3750 in cash, as well as a small quantity of marijuana (Lino, 140-142, 169).*** Appellant, who was bleeding from a head injury requiring hospital treatment later that evening, was found in possession of $529 in cash, but no drugs (Lino, 146, 167-168, 170). The drugs, cash, and pouch taken from Maritza, as well as the cash taken from appellant, were introduced into evidence.

After the Government rested its case and the Court denied appellant's motions for a judgment of acquittal on both counts of the indictment (188-193),**** the defense presented its case, with both defendants testifying.

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* The windows of the van were closed (164).

** Photographs showing the damage to the agents' car were introduced into evidence as Govt. Exhibits 9 and 10.

*** Frederick Martorell, a Government chemist who analyzed the two drugs, found that the substance containing cocaine weighed 21.5 grams (less than an ounce), and the marijuana 7.6 grams (a quarter of an ounce) (61-71).

**** Appellant argued insufficiency of the evidence, entrapment as a matter of law, and Governmental "creative activity."

B. The Defense Case

Appellant Walter Swiderski, who was 29 years old and resided with his fiancee, Maritza, in Clifton, New Jersey, was employed as a painter by the Manor Painting Company after completing three semesters of college. He also worked in a women's clothing boutique owned by Maritza (195-198).

Appellant came to know Davis in November, 1973, when he was introduced to Davis by a third party who said Davis could get marijuana for appellant (198-199). While Davis supplied marijuana on several occasions to appellant for his own use, appellant testified that before meeting Davis he had never tried cocaine (199-200). At the end of 1973 or the beginning of 1974, Davis began giving appellant small amounts of cocaine to "snort," which appellant tried on several occasions at Davis' invitation (202-204). Appellant testified, however, that prior to June, 1975, he had never purchased cocaine from Davis or anyone else (205).

On May 31, 1975, appellant's birthday, Davis called and offered to sell appellant marijuana (206-207). When appellant arrived that evening at Davis' room in the Chelsea Hotel, Davis told him to "hang around" for a short time and Davis would "turn [him] on" with cocaine as a birthday present (208). Later, Davis told appellant that he had no cocaine but gave appellant some "speed" to try and then sold appellant a small amount of that drug for $65.00 (210-212). When Maritza called looking for appellant, appellant left Davis' room and

returned to his home in New Jersey (212).

On June 1st and 2nd, appellant did not speak to Davis. Instead, he and Maritza attended the National Boutique Show at the Hotel McAlpin on Sixth Avenue and 33rd Street in Manhattan, setting up the fall line of merchandise for his fiancee's boutique (212-213). Registration badges with their names on them, and a brochure for the boutique show indicating its duration from June 1-4, 1975, were introduced into evidence as Defendants Exhibit A (214). On June 3, appellant and Maritza intended to go to the boutique show to make actual purchases for their store as well as for their own personal wardrobes (215-217). Knowing that they could get discounts if they paid in cash, appellant and Maritza decided to bring cash with them to the show (275-278).

On the morning of June 3rd, however, Davis called appellant, telling him of a "fantastic" cocaine transaction (218-219). Appellant testified that he was uninterested, hung up the phone, and went back to sleep (219). Davis called back an hour later and invited appellant to stop by Davis' hotel room for a party where he would be "turned on" to some free cocaine before he went to the boutique show (219). Appellant agreed and arrived at the Chelsea Hotel with Maritza at 3:00 p.m. on June 3rd (219-220). Davis told them, however, that the party was elsewhere, and asked them to drive him and another friend waiting in the lobby to the place (221-222). Although Maritza did not want to, appellant agreed to drive

Davis and his friend, and followed Davis' directions to West 48th Street (222-224).

Upon arriving at the building, Davis invited them to come up and "turn on" before going to the boutique show and, while reluctant, appellant and Maritza agreed to come up at Davis' coaxing (224-225). Inside the apartment, two black men were waiting, and appellant was introduced to one of them named "CB" or "BC" (226-227). While Maritza waited in another room, appellant was called into a bedroom by Davis who had placed some cocaine on a mirror (228). Concerned about Maritza, appellant called her into the bedroom where they both "snorted" the cocaine at Davis' urging (228-229). When appellant and Maritza indicated they were ready to leave, Davis became "excited" and asked them how much cocaine they were going to take (23). Not wanting to "aggravate" Davis or the others, and feeling they were in a "spot," Maritza said that they would take a gram (23). Davis began "yelling" that they must take a whole package of cocaine which had already been prepared (230-231). Fearing that he or Maritza would be beaten or something else "terrible" would happen, appellant asked Davis, "how much is it going to cost me to get out of here?"(231). When "CB" said $1250, appellant took the money from Maritza and gave it to "CB" (231-232). One of the black men dropped the package of cocaine into Maritza's purse, and the defendants left the apartment with Davis (232-233).

After dropping Davis off at the Chelsea Hotel, appellant and Maritza began driving uptown, headed for the Boutique Show at the McAlpin Hotel (233-234). At 34th Street, a car cut in front of them and several men jumped out with guns drawn (235-236). Not realizing they were police, the two defendants "panicked" and appellant tried to drive around the car in front (236). when appellant finally was shown a badge, appellant stopped the truck and got out, whereupon he was hit over the head by an officer (237-238).

Appellant's co-defendant, Maritza, a 25 year old graduate of Marymount College, corroborated generally appellant's account of his relationship with Davis and the events of May 31-June 3 (282-316). She testified that the marijuana found in her purse was for her own personal use, and she did not know if appellant realized she had brought it along on June 3rd (288, 299-300).

C. Requests to Charge and Instructions to the Jury*

In his request to charge, appellant asked the Court to instruct the jury that the testimony of a paid informer "must be examined and weighed by the jury with greater care than the testimony of an ordinary witness."** Although the Court recognized that the request was drawn from Devitt and Blackmar and that it was "right," he denied the request because "it is up to [the jury] to measure the banality of a witness against

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* The Court's charge is "C" to appellant's appendix.

** Appellant's request to charge on informer testimony is "D" to appellant's separate appendix.

[the general] standards [he would give them] and it is not up to me to tell them they should change those standards." (339). In its charge on credibility, while the Court told the jury that "you will subject the testimony of all of these witnesses to the same standards, whether they were Government witnesses or defense witnesses," (440) and further told the jury generally what factors to consider in assessing credibility (440-441), it instructed the jury specifically as to the defendants: "Obviously they have an extremely important interest here in testifying and that is a factor, their interest you may consider" (441). After the Court had initially completed its instructions, and was then requested by counsel for the co-defendant to charge that "the informer per se is an interested witness" (446), the Court told the jury:

> Ladies and Gentlemen, remember I told you you would consider the interest a person might have and I referred to the witnesses and to the defendants. But it occurred to me you might also think about whether Mr. Davis had an interest in testifying so I just add that to the others whose interest you might consider.
> (447, Emphasis added)

In its charge on burden of proof in the entrapment defense, the Court instructed the jury:

> Here Swiderski must establish that the idea of purchasing the cocaine originated with Davis and not with him.
> [Appellant] must show that he had no previous disposition, interest or purpose to possess or to distribute the cocaine; that it was Davis that implanted in his mind, as an innocent person, the disposition to commit the crime of purchasing the cocaine.
> (432-433)

Later, after explaining to the jury that "the narcotics business is one which is filled with concealment and guilt" necessitating the Government to use paid informers (433), without a corresponding explanation of the theory of the entrapment defense, the Court charged the jury to

> . . . determine whether the defendant Swiderski has established here that he would not have purchased the cocaine on June 3 except for Davis' enticement, inducement, on blandishments, if you will, and if you so find that Swiderski has shown that . . . then the Government . . . must prove beyond a reasonable doubt that [appellant] was ready and willing to make the purchase on June 3 and that Davis merely afforded him the opportunity to do so. (443-444)

When counsel objected at the conclusion of the charge that "in discussing entrapment I thank you placed too heavy a burden on the defendant" (444)j the Court denied the objection, giving appellant an exception to it.*

After the return of the jury's guilty verdict as to appellant on October 23, appellant moved for a judgment of acquittal based on entrapment as a matter of law,** and for a new trial because of the Court's charge on entrapment burden of proof (Document #4 to the record on appeal). Both motions wer denied.

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* Appellant had also submitted a requested charge on entrapment which is "E" to appellant's separate appendix.

** Appellant had also submitted a requested charge on a theory of "creative activity" which is found as "F" to appellant's separate appendix.

ARGUMENT

POINT I

THE TESTIMONY OF THE PAID GOVERNMENT INFORMER, UNCORROBORATED ON THE CRITICAL ISSUE OF ENTRAPMENT, WARRANTED A SPECIAL INSTRUCTION TO THE JURY TO SCRUTINIZE IT CAREFULLY, AND THE DISTRICT COURT'S FAILURE TO GIVE SUCH A CHARGE, DESPITE A DEFENSE REQUEST, REQUIRES THE REVERSAL OF APPELLANT'S CONVICTION.

Appellant Swiderski's guilt was predicated almost entirely upon the testimony of Martin Davis, a paid Government informer who was charitably characterized by the prosecutor, himself, as a "headhunter," "not a model citizen," "not a nice guy." The trial judge nevertheless denied a defense request to charge the jury that the testimony of such a witness warranted special scrutiny and, in so doing, committed error. This error was compounded by the Court's contrasting characterization of appellant and his co-defendant as "obviously . . . hav[ing] an extremely important interest here in testifying and . . . their interest you [the jury] may consider." In light of this imbalance in a case in which it was essentially the informant's word against that of the two defendants, the Court's perfunctory statement to the jury at the conclusion of its charge that the jury "might also think about whether Mr. Davis had an interest in testifying," was inadequate to cure the error in refusing appellant's requested charge.

Although the conviction of a defendant in a federal trial may be based solely on the uncorroborated testimony of an informer [Hoffa v. United States, 385 U.S. 293 (1966); On Lee v. United States, 343 U.S. 747 (1952); United States v. Gonzalez, 491 F.2d 1202, 1207 (5th Cir. 1974); United States v. Kinnard, 465 F.2d 566, 572 (D.C. Cir. 1972)], the danger of fabrication inherent in the testimony of a paid informer, who has a recognized motive to lie, has been repeatedly noted by the Courts. "Such an informant presents particular dangers in regard to 'producing' cases, e.g., including the development of claims that the transactions that evolved reflected predisposition on the part of the defendant as contrasted with entrapment." United States v. Lee, 506 F.2d 111, 122 (D.C. Cir. 1974). See also, e.g., United States v. Gonzalez, supra; United States v. Kinnard, supra; United States v. Griffin, 382 F.2d 823, 827-828 (6th Cir. 1967); Todd v. United States, 345 F.2d 299, 300 (10th Cir. 1965). Accordingly, where such informers testify, a defendant is not only entitled to "broad latitude to probe credibility by cross-examination" [On Lee v. United States, supra, 343 U.S. at 757], but also to have the jury "fully apprise[d] . . . of the inherent possibility of such testimony's untruthfulness." United States v. Gonzalez, supra. See also, United States v. Kinnard, supra, 465 F.2d at 570; United States v. Masino, 275 F.2d 129, 133 (2d Cir. 1960); Cratty v. United States, 163 F.2d 844, 850 (D.C. Cir. 1947). While the failure to give such instructions may be excused

where the informant's testimony is corroborated by other evidence [United States v. Lee, supra; Todd v. United States, supra, 345 F.2d at 301; Cratty v. United States, supra], the refusal to give such instructions, where the defense requests it and where the informer's testimony is largely or entirely uncorroborated, constitutes prejudicial error. United States v. Lee, supra; McMillen v. United States, 386 F.2d 29, 35 (1st Cir. 1967); Joseph v. United States, 286 F.2d 468, 469 (5th Cir. 1960); United States v. Masino, supra; Fletcher v. United States, 158 F.2d 321 (D.C. Cir. 1946).*

In Masino, supra, this Court reversed the conviction where, among other things, the trial judge denied a defense request to charge the jury that the testimony of a paid informer "must be examined with greater scrutiny than the testimony of an ordinary witness." This Court held that

> Whether a failure so to charge is error or not depends on the other circumstances of the case. But here the Government's case depended on Brown [the informer] and Beville [an accomplice] almost entirely and therefore it was error not to instruct the jury substantially as counsel requested, namely that such testimony should be scrutinized with special care.
>
> (Ibid, at 133, Emphasis added)

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* The need for cautionary instructions as to informer testimony is apparently so great that even where the informer's testimony is corroborated, many courts recommend that such instructions nonetheless be given. See, e.g., Todd v. United States, supra; Joseph v. United States, supra.

Here, as in Masino, appellant's counsel requested the Court to instruct the jury that the testimony of a paid informer "must be examined and weighed by the jury with greater care than the testimony of an ordinary witness."* Leaving aside for the moment the question of corroboration, the nature of the informer in this case amply demonstrates why his testimony should have been viewed with suspicion, necessitating the requested charge.

Davis' collaboration with the Government was hardly the product of any altruistic, public-spirited inclination. On the contrary, it was prompted solely by a desire to avoid prosecution and for money, by a person who was otherwise unemployed. Thus, having been a narcotics dealer prior to September, 1973, Davis approached the New York City police out of fear of the severe penalties New York would impose on drug dealers after that date, and only then because a sixteen year old had already informed the police of Davis' illegal activities. Moreover, upon asking for "monetary reward" in exchange for his help and being told that the New York police had no money to give, Davis refused to co-operate. It was only after DEA agents approached him two months later and told him that "the federal government had more money than that city," that Davis agreed to sell his services as an informer. These facts alone - the purchase of Davis' services by the highest

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* The requested charge was drawn verbatim from Devitt and Blackmar, Federal Jury Practice and Instructions (2d ed. 1970), §12.02, p. 255, which has not only been cited approvingly by other courts [see, e.g., United States v. Johnson, 506 F.2d 640, 642-643 n.4 (8th cir. 1974), cert. den. U.S. , 95 S. Ct. 1404 (1975); United States v. Miller, 499 F.2d 736, 742 (10th Cir. 1974)], but which was recognized as "right" by the District Court in this case.

Governmental bidder - justify the conclusion that the use of such an informer was "dirty business" raising "serious questions of credibility." On Lee v. United States, supra, 343 U.S. at 757.

The credibility of Davis' testimony, however, was further subject to question as a result of the contingent fee method on which Davis was paid. Williamson v. United States, 311 F.2d 411 (5th Cir.), cert. den. 381 U.S. 950 (1965), cited in United States v. Archer, 486 F.2d 670, 677 n.6 (2d Cir. 1973). (See, Point V., infra, pp.42-44). Beginning in November, 1973, at a time when Davis was "broke," the DEA agents paid him on a case by case basis -- "The more cases [he] made the more money [he] would make." While Davis began receiving a salary in February, 1975, because he had not been "too successful" and was again "broke" and "in debt," his salary was "reviewed every month based on [his] successfully cooperating" with the Government agents. Moreover, even while on this reviewed salary, Davis received a bonus for "making" particularly important cases, earning for himself $16,000 in all based on less than two years of providing informer services.

In short, Davis fully merited the prosecutor's own characterization of him as a "paid headhunter."

> Since the informer was to be paid only in those cases wherein his efforts were successful, and his livelihood was dependent upon the funds derived from his activities, he had every motive to induce the

> commission of the offense charged to this defendant . . . He had every motive to testify falsely.
>
> (United States v. Silva, 180 F. Supp. 557, 559 (S.D.N.Y. 1959) (Weinfeld, J.)

See also, Fletcher v. United States, supra, 158 F.2d at 322.

Even if the testimony of an informer like Davis was fully corroborated, "the trial court would be well advised to caution the jury as to its dependability" [Cratty v. United States, supra, 163 F.2d at 850], particularly where a defendant has requested such an instruction. Here, however, there was at best "only minor corroboration" of unimportant factors "that still left the Government's case hanging almost entirely on informant testimony," United States v. Lee, supra, 506 F.2d at 121. Indeed, the prosecutor appeared to concede this point at trial when he told the jury

> . . . the character of this witness may be central to his case . . . His testimony is the only testimony that can tell you what happened in that apartment.
>
> (14)

Despite the ease with which the Government could have provided meaningful corroboration (for example, by monitoring the numerous phone conversations Davis claimed he had with appellant between May 31st and June 3rd, or waiting to arrest appellant until after he had returned to Bush's apartment to purchase the other three ounces of cocaine), they offered almost none. The Government even failed to call as a witness

Agent Fekete, who was Davis' contact in the DEA and presumably knew most about the transaction Davis arranged with appellant. The two agents who did testify, Lino and Lamireta, did little more than confirm what appellant had conceded, i.e., that he and his fiancee picked up Davis at the Chelsea Hotel on June 3, 1975, drove him to the apartment on West 48th Street, and dropped him off at the Hotel afterwards. The fact that these agents found the cocaine and cash in appellant's van was not disputed by appellant and did not affect the central issue in the case, i.e., whether appellant was entrapped. Moreover, the testimony of these agents concerning appellant's attempt to escape in his van, while possibly amenable to an inference of consciousness of guilt, was equally susceptible to an innocent interpretation, i.e., that appellant, understandably "scared to death" by the unexpected approach of civilians waving guns, was only attempting to escape harm to himself and his fiancee from people he did not know were officers. Cf. United States v. Kearse, 447 F.2d 62 (2d Cir. 1971).

Thus, the critical issues in the Government's case against appellant depended "almost entirely," or even completely upon the testimony of a particularly unsavory paid informer. United States v. Masino, supra. Accordingly, pursuant to appellant's request, the Court was at least required to instruct the jury that "such testimony should be scrutinized with special care." Id.

The Court's erroneous refusal to give this required warning was not cured by the meager instructions the Court did give on informer testimony. On the contrary, while the Court first gave general instructions to the jury on how to assess credibility, telling them to consider a witness' demeanor, background, occupation, candor, bias, means of information, and accuracy of recollection, none of these factors were particularized to the informer. Compare the charge in United States v. La Sorsa, 480 F.2d 522, 527 (2d Cir. 1973).

Moreover, although the Court instructed the jury to "subject the testimony of all witnesses to the same standards, whether they were Government witnesses or defense witnesses," it was only the defendants' testimony that was singled out for especially searching scrutiny: "Obviously [the defendants] have an extremely important interest here in testifying and that is a factor, their interest you may consider." In contrast to this pointed language, carrying with it the clear implication that the defendants had a strong motive to lie, the Court merely told the jury as to the informer that "it occurred to me you might also think about whether Mr. Davis had an interest in testifying so I just add that to the others whose interest you might consider." This perfunctory and off-handed instruction, in addition to treating appellant unevenly as compared to Davis,* fell far short of the required charge

* The uneveness of the charge was further exacerbated by the Court's explanation to the jury that "the narcotics business is one which is filled with concealment and guilt, and to apprehend violators under the narcotics laws the Government must employ various strategems, including the use of paid informers and undercover agents." Absent from that instruction was any countervailing explanation of the policy sought to be furthered by the entrapment defense. Compare, United States v. Braver, 450 F.2d 799, 805 (2d Cir.), cert. den., 405 U.S.1064 (1972).

that the jury, not only "might" consider whether Davis had an "interest" in testifying, but "should" scrutinize the informer's testimony with "special care." United States v. Masino, supra. In any event, it was clearly not the "careful instructions" on informer testimony to which appellant was entitled. On Lee v. United States, supra, 343 U.S. at 757.

In this case, the jury's primary function was to determine whether Davis was telling the truth. "Where a party's case 'may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny'" [United States v. Jordano, 521 F.2d 695, 698 (2d Cir. 1975)], and where that witness is a paid informer, the jury must be told so. The Court's failure to do so in this case, while emphasizing the defendants' interest, was unavoidably prejudicial. United States v. Griffin, supra, 382 F.2d, 829. Accordingly, appellant's conviction should be reversed.

POINT II

THE TRIAL COURT'S CHARGE ON ENTRAPMENT ERRONEOUSLY REQUIRED APPELLANT TO MEET A BURDEN OF PROOF WHICH WAS NOT HIS TO CARRY.

Despite appellant's request to charge that, in essence, the Government must prove predisposition beyond a reasonable doubt (Appendix "E"), the Court insisted on instructing the jury that it was appellant, himself, who

> . . . must establish that the idea of purchasing the cocaine originated with Davis and not with him.
>
> He [appellant] must show that he had no previous disposition, intent or purpose to possess or distribute the cocaine; that it was Davis that implanted in his mind, as an innocent person, the disposition to commit the crime of purchasing the cocaine.
>
> (Emphasis added)

Moreover, while appellant objected at the conclusion of the Court's charge that "in discussing entrapment I think you placed too heavy a burden on the defendant," the Court nevertheless refused to alter its charge on entrapment in any way.

Thus, the jury was told in effect that appellant had the burden of proving his lack of predisposition. The law, however, is indisputably to the contrary. United States v. Rosner, 485 F.2d 1213, 1221-1222 (2d Cir.), cert. den., 417 U.S. 950 (1974); United States v. Braver, 450 F.2d 799, 805 (2d Cir.), cert. den. 405 U.S.1064 (1972); United States v. Greenberg, 444 F.2d 369, 371-372 and n.3 (2d Cir.), cert den. 404 U.S. 853 (1971); United States v. Berger, 433 F.2d 680, 684 (2d Cir.), cert. den.

401 U.S. 967 (1971); United States v. Riley, 363 F.2d 955, 958 (2d Cir. 1966); United States v. Smalls, 363 F.2d 417, 419 (2d Cir. 1966). In Braver, supra., this Court recommended to the district courts of this Circuit that,

> In explaining the burden of proof on entrapment, it will be enough to tell the jury that if it finds some evidence of Government initiation of the illegal conduct, the Government has to prove beyond a reasonable doubt that the defendant was ready and willing to commit the crime.
>
> (Emphasis added)

Braver and subsequent decisions of this Court make it clear that, while the language concerning the defendant's burden of proving Government inducement or initiation may be flexible, the burden of proving a defendant's propensity or predisposition to commit the crime is, and always was, on the Government and not on the defendant. Ibid, at 801-802; United States v. Rosner, supra.

Accordingly, under well-settled principles, appellant was not required to "show that he had no previous disposition, intent or purpose to possess or distribute the cocaine," and the district court palpably erred when it told the jury that appellant had such a burden.

After giving the foregoing improper charge, the Court later instructed the jury to

> . . . determine whether the defendant Swiderski has established here that he would not have purchased the cocaine on June 3rd except for Davis' enticement, inducements, or blandishments, if you will, and if you

> find that Swiderski has shown that. . . then the Government . . . must prove beyond a reasonable doubt that the defendant . . . was ready and willing to make the purchase on June 3rd and that Davis merely afforded the opportunity to do so.
>
> (Emphasis added)

While this charge properly assigned the burden of proving propensity or predisposition to the Government, the Court failed to indicate to the jury that its earlier instruction, placing the burden of disproving propensity on appellant, was in anyway incorrect, misleading, or to be disregarded. Thus, here, as in United States v. Persico, 349 F.2d 6, 9 (2d Cir. 1965), "while the Court gives some proper instructions . . . confusion is created by other portions of the charge on this subject." Since the charge on burden of proof was internally inconsistent, and therefore inevitably confusing, "the guidance given the jury did not approach that standard required to enable it to fulfill its function properly . . . " United States v. Clark, 475 F.2d 240, 251 (2d Cir. 1973). See also, Bollenbach v. United States, 326 U.S. 607, 612-613 (1946) ("A conviction ought not to rest on an equivocal direction to the jury on a basic issue.").

Furthermore, by using the word "established" in its later instruction, the Court aggravated its initial error on burden of proof. A defendant does not have to "establish" that he would not have committed the crime except for the Government's enticement or inducement in order to succeed with an entrapment defense. Rather, the jury need only find that a defendant has "adduced

some evidence," [United States v. Berger, supra, 433 F.2d at 684], or that there is "some evidence" of Government initiation of the illegal conduct [United States v. Braver, supra, 450 F.2d at 805], clearly a much less stringent standard.*

The jury may well have believed that appellant's burden to "establish" Government inducement meant that he must "establish" it beyond a reasonable doubt, since the reasonable doubt standard pertaining to the Government was the only one articulated in the Court's charge. It was precisely to avoid this type of confusion, that this Court recommended there be "no reference to 'burden' or 'burden of proof' or 'preponderance of the evidence' in describing a defendant's obligation." Id. The phrase, "determine whether defendant Swiderski has established," connotes a similarly objectionable "burden."

Since appellant's successful assertion of his entrapment defense depended entirely upon the jury believing his testimony rather than Davis', the improper evidentiary burden he was forced to carry, i.e., not only requiring him to "establish" Government inducement but to disprove his own propensity to commit the crime, substantially prejudiced his defense.

Therefore, appellant's conviction should be reversed.

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* It should be noted that, while the Government claimed in its memorandum in opposition to appellant's post-trial motion for a judgment of acquittal or a new trial that the Court's charge on burden of proof was "nothing more than a more concise and clearer charge than that which was approved in United States v. Berger" (Document #5 to the record on appeal, p. 3), the Government itself had requested a charge that that defendants only "must adduce some evidence" of Government initiation ("G" to appellant's separate appendix).

POINT III

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY AT APPELLANT'S REQUEST THAT THERE WAS NO EVIDENCE THAT THE DEFENDANTS HAD THREATENED THE INFORMER WAS PREJUDICIAL ERROR.

Despite the Court's earlier promise to counsel, occasioned by the prosecutor's improper questions to the informer concerning threats made against him, that it would "straighten . . . out" the jury before or during the charge by telling them "there is no evidence of any threats," the Court failed to instruct the jury in any way on the issue of threats.* The Court's failure to charge on this issue was based on its unfounded belief that "the jury has forgotten all about it," and a misplaced, oversolicitous desire to protect the defendants from prejudice: ". . . I don't see any point in raising it because everytime you raise it you don't know what the reaction is to the jury." Defense counsel, however, had as much or more opportunity to guage the impact on the jury of the prosecutor's improper questions, and whether or not the jury had actually forgotten the matter which had occurred only a day and a half before. It was counsel's judgment that cautionary instructions were necessary. The Court's refusal to defer to their judgment on how best to protect their clients' rights, despite the Court's earlier promise to do so, may well have

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* The Court was reminded of its earlier promise both by requests to charge and by exceptions to the charge afterwards.

left the jury with the mistaken impression that the defendants were responsible for threats against the informer. Thus, the Court committed prejudicial error.

That the trial Court properly sustained the objection to the prosecutor's question concerning the threats, there can be little doubt. With full knowledge that appellant and his co-defendant were not responsible for any threats, the prosecutor insisted on asking the informer, "[D]uring that period of time [that you lived in the Chelsea Hotel] had your life been threatened?", thereby unavoidably creating the impression that the defendants may have been involved in such activity.* While there may not be insufficient basis to conclude that the prosecutor asked the question "to prejudice the jury to hint that these defendants had threatened the life of Martin Davis" [sic], an assertion made by counsel for appellant's co-defendant, the Court was clearly correct in stating, "I don't think we need to get into this at all."

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* The prosecutor's attempted justification for this line of questioning, i.e., that appellant's counsel had opened the door on his cross-examination, was a weak one. The prosecutor's claim was based on the fact that appellant's counsel sought to elicit from the informer the amount of money he had received in the period after appellant's arrest. In response to counsel's question, "Do you recall what kind of payments you have received since [June 5, 1975]?", the informer volunteered that his "salary lapsed at the end of June and I was put in a hotel for my safety and they did not give me any money, they just paid for the hotel room . . . " (103). (Emphasis added). The prosecutor himself later conceded that "Mr. Lipson quite properly, in order to protect himself, stopped [this line of questioning]." (153) Moreover, even if counsel's questioning "opened the door" slightly, as the prosecutor claimed, the battering ram the prosecutor tried to drive through by his question, raising the inference that the defendants were involved in threats, created a greater risk of prejudice than was warranted by the probative value of this line of inquiry. Cf. United States v. Torres, 519 F.2d 723, 727 (2d Cir. 1975); United States v. Papadakis, 510 F.2d 287, 294 (2d Cir.) cert. den. 421 U.S. 950 (1975).

Moreover, the Court itself appeared to agree, at least initially, that the prosecutor's questions may have prejudiced the jury. There is no other way to interpret the Court's assurance, in denying appellant's motion for a mistrial, that

> I will straighten [the jury] out on that. If it doesn't happen before, I will straighten it out on the charge. I will tell them there is no evidence of any threats.

If the Court did not believe the jury had been prejudiced, there would have been nothing to "straighten out" and no reason to tell the jury that "there is no evidence of threats."

Since the Court itself appeared to recognize the potential harm that had been done, it is difficult to understand on what basis the Court concluded that "the jury has forgotten all about it." From start to finish, the trial lasted only two and a half days, and the prosecutor's improper inquiry concerning threats had occurred near the end of the first day of trial. Thus, there was only a day and a half period between the time the issue of threats arose and the time the case was submitted to the jury. This was hardly a sufficient length of time on which to conclude that the jury had "forgotten all about" the matter, particularly since the inference that the defendants had threatened the life of the Government's key witness was not one that was likely to be forgotten. In short, it was entirely reasonable for defense counsel to conclude that the jury had <u>not</u> "forgotten all about it," and to

request the cautionary instruction the Court had earlier promised to give..

The Court's second reason for not giving that instruction ["I don't see any point in raising it because everytime you raise it you don't know what the reaction is to the jury."] was equally inappropriate and difficult to understand. That statement cannot be interpreted as reflecting a concern for any legitimate right of the Government. That is, if the Court told the jury that there was no evidence of any threats by the defendants, it would only be telling them what in fact was the case; if it failed to give that instruction, the jury may have been left with the mistaken impression that the defendants had engaged in threats.

Thus, giving the Court's second reason its most benign interpretation, it can be read as reflecting the Court's concern that the defendants might somehow be prejudiced by instructing the jury on the issue of threats, particularly when the jury might already have forgotten about it. While it may be true that the district court has "an active responsibility to see that a criminal trial is fairly conducted"[United States v. Curcio, 279 F.2d 681, 682 (2d Cir. 1960)], that responsibility does not extend to supplanting the judgment of competent counsel with the Court's own judgment as to the desirability of a cautionary instruction.

Since the Court had earlier determined that the possibility of prejudice was sufficiently great to require a cautionary in-

struction, and had even assured counsel it would give one, it should have given the instruction when counsel requested it to do so. Failing that, it should have permitted counsel the opportunity of bringing out through cross-examination the fact that the defendants were not responsible for any threats.* Having done neither, the Court committed prejudicial error.

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* When the co-defendant's counsel sought to establish on his re-cross examination of the informer that the co-defendant, at least, had never threatened the informer, the Court refused to permit that inquiry (133).

POINT IV

THE CUMULATIVE EFFECT OF THE ERRORS DISCUSSED IN POINTS I, II, AND III WAS TO DEPRIVE APPELLANT OF A FAIR TRIAL.

Assuming arguendo that none of the three errors discussed above would, individually, warrant reversal of appellant's conviction, taken together they compel the conclusion that appellant was substantially denied a fair trial. United States v. Fields, 466 F.2d 119, 121 (2d Cir. 1972); United States v. Masino, supra, 275 F.2d at 133. These errors go directly to the heart of the case - how the jury was to view the informant's testimony (POINTS I and III) and what appellant had to show to the jury in order to make out successfully his entrapment defense (POINT III). Here, as in Fields, appellant was entitled to have the jury charged clearly and properly on these critical matters, and the cumulative effect of the trial Court's failure to do so requires a reversal of the conviction.

POINT V

THE FACT THAT THE GOVERNMENT INFORMER NOT ONLY SUPPLIED APPELLANT WITH THE CONTRABAND BY ARRANGING A TRANSACTION WITH A NARCOTICS DEALER TO WHOM APPELLANT OTHERWISE HAD NO ACCESS, BUT DID SO ON A CONTINGENCY FEE BASIS, EXCEEDED THE LIMITS OF PERMISSIBLE GOVERNMENT CONDUCT AND REQUIRES A JUDGMENT OF ACQUITTAL AS A MATTER OF LAW.

The undisputed facts at trial demonstrated that appellant would not have possessed the cocaine for which he was convicted had Davis, the informer, not arranged and promoted the meeting between appellant and the narcotics dealer to whom appellant had no other access. Thus, Davis played the traditional role of a middleman in an illegal narcotics transaction and, in effect, was as much responsible for supplying appellant the contraband as if Davis, himself, had sold it to appellant. Moreover, Davis was not only paid by the Government for playing this role, but was paid on a contingent fee basis, with all the recognized inducements to fabricate and manufacture cases that such a method of payment creates. The combination of these factors, whether it be termed a denial of due process, entrapment as a matter of law, or conduct calling for an exercise of this Court's supervisory power, amounted to an impermissible degree of Government "creative activity" [Sorrells v. United States, 287 U.S. 435, 441, 451 (1932); Sherman v. United States, 356 U.S. 369, 372 (1958)], thereby vitiating appellant's conviction regardless of how predisposed appellant was to commit the crime.

The Supreme Court in United States v. Russell, 411 U.S. 423 (1973), continued to adhere (in a 5-4 decision) to the so-called "subjective" approach to the entrapment defense [Ibid, at 440], earlier annunciated in Sorrells and Sherman, in which the primary focus is centered on the defendant's criminal predisposition rather than on Government misconduct. Russell, however, left open the possible defense that some types of Government activity, touching on "due process principles," can not be countenanced no matter how guilty a defendant otherwise is. Ibid, at 431-432. See also, United States v. Archer, 486 F.2d 670, 676-677 (2d Cir. 1973).

Central to the Court's analysis in Russell that entrapment was not shown as a matter of law was the fact that the defendant "was an active participant in an illegal drug manufacturing enterprise which began before the Government agent appeared on the scene, and continued after the Government agent left the scene." Ibid, at 436. See also, United States v. West, 511 F.2d 1083, 1086 (3d Cir. 1975). In this context, the Russell Court deemed it significant that the agent there had only provided the defendant with an obtainable, legally possessed, harmless chemical component which merely enabled the defendant tocomplete the on-going, illegal drug manufacturing process. Russell, supra, at 432.

Even in light of Russell, however, "[f]ederal courts have shown grave concern over the government practice of providing narcotics to those who are, in turn, arrested for possessing

or selling them," [United States v. Johnson, 495 F.2d 242, 244 n.2 (10th Cir. 1974)] and have distinguished Russell on the basis that the agent there did not actually supply the defendant with contraband. Where contraband has been supplied, or where the issue was not presented to the jury when the facts were in dispute, convictions have been reversed irrespective of the presence or absence of a defendant's criminal propensity. See, e.g., United States v. West, supra, 511 F.2d at 1085-1086; United States v. Mosley, 496 F.2d 1012, 1015-1016 (5th Cir. 1974); United States v. Oquendo, 490 F.2d 161, 164 (5th Cir. 1974); United States v. Bueno, 447 F.2d 903, 906 (5th Cir. 1971). Cf. United States v. Johnson, supra, 495 F.2d at 244. But see, United States v. Hampton, 507 F.2d 832 (8th Cir.) (Heaney, J., dissenting), cert. granted, 420 U.S. 1003 (1975); United States v. McGrath, 494 F.2d 562 (7th Cir. 1974); United States v. Jett, 491 F.2d 1078 (1st Cir. 1974). Those Courts which reversed convictions were of the view that, by supplying a defendant with contraband, the Government had engaged in an impermissible degree of creative activity, and that prosecutions based on possessing or selling that contraband were intolerable.

Here, of course, the Government resorted to a similar tactic. While it was a dealer named Carlton Bush, and not the informer Davis, who was the ultimate source of the cocaine, Davis played an indispensible part in facilitating appellant's possession of the contraband for which appellant was indicted and convicted. Had it not been for Davis' role in arranging and

promoting the transaction, appellant would concededly not have had access to that dealer and would not have been in possession of cocaine.*

Thus, this case is very different from the typical narcotics prosecution in which a narcotics dealer with existing access to drugs is induced to sell the contraband to a Government agent or informer and is subsequently prosecuted for it. Here, access to the drugs in question was provided by the informer, with approval of the DEA, knowing that appellant would immediately thereafter be arrested for possessing those drugs. In short, this case involves deliberate Government action to furnish narcotics to a person for the sole purpose of prosecuting him for possessing those same narcotics. As such, this case falls within Bueno, supra, and its progeny, and should be

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* Under this argument, it is no answer that appellant may have been able to secure cocaine from another source without the informer's help, a claim that the informer testified appellant had made. Of course, a person genuinely predisposed to possess cocaine will ordinarily be able to find a seller on his own. The point here is that, while predisposition is relevant to traditional entrapment analysis, the informer's conduct in arranging and promoting the narcotics transaction took this case out of the traditional entrapment defense and made appellant's predisposition irrelevant. If appellant was able to secure cocaine on his own, he should have been permitted to do so and then arrested for its possession or distribution. If propensity were relevant, however, it is significant to note that while the informer testified appellant had once given him on THC capsule (a hashish derivative) and appellant himself admitted to smoking marijuana, there was no evidence that appellant had ever been involved with cocaine before he met the informer. thus, his claim (if he made it) that he had other sources for securing cocaine sounds very much as though appellant was "puffing."

reversed on the authority of those decisions.*

This tactic of furnishing contraband and then prosecuting for its possession lacks the element of necessity which has generally been used to justify Government undercover involvement in crime. Lewis v. United States, 385 U.S. 206, 208-209 (1966). If a person is genuinely predisposed to possess narcotics, he almost certainly will be able to obtain it through other sources, and can then be legitimately prosecuted for its possession. If such person cannot otherwise obtain narcotics except through a Government agent, there seems little point to be served in prosecuting him. Comment, "Criminal Procedure: Entrapment Rationale Employed to Condemn Government's Furnishing of Contraband," 59 Minn. L. Rev. 444, 457-458 (1974).

On the other hand, reversing the conviction where an informer supplies the contraband would serve to further salutary law enforcement practices. Id. At a minimum, it would encourage the Government to exercise greater precaution with and to assert greater control over informers the Government employs.**

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* The Government itself conceded in a pre-trial memorandum that "[e]ntrapment as a matter of law would arise only if the informant had furnished the contraband to the seller or the cash or the means of delivery" (Document #3 to the record on appeal, p. 4), thereby acknowledging the viability of the Bueno, supra, defense. Moreover, the Government's reliance below on United States v. Lue, 498 F.2d 531 (9th Cir.), cert. den. 419 U.S. 1031 (1974), to take this case out from under the Bueno principle is misplaced. In Lue, while a Government agent actually gave the contraband to the defendant, he was merely acting as a conduit between Lue and Lue's pre-existing source in Hong Kong who had sent the drugs to the agent. Here, there was no such pre-existing source or arrangement for narcotics between appellant and the seller, to whom appellant had no access without the informer's contrivance.

** There was in this case no evidence that the Government supervised the informer's activities or in any way instructed him on the rules of entrapment. Cf. Williamson v. United States, supra, 311 F.2d at 444.

Furthermore, it would reduce an informer's motivation to deal in contraband which, in turn, would further the desired end of lowering the overall trade in narcotics.

While this Court has apparently never decided the issue of whether acquittal is required where the Government furnishes the contraband,* it is not prevented from reversing appellant's conviction by Russell, which is distinguishable on its facts. Here, unlike Russell, the substance that the informer was indispensible in supplying was not a harmless, legal chemical but a dangerous, illegal narcotic.** Moreover, unlike Russell, there was no evidence that appellant had any previous experience with cocaine prior to his involvement with the informer. Finally, unlike Russell, Martin Davis was not a trained, undercover agent whose job might be jeopardized by overreaching activity, but an informer and a "headhunter" who was paid on a "contingency fee" basis.*** This latter factor is significant

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* As with Lue (see Fn., p. 41), the Government's reliance below on this Court's decision in United States v. Rosner, 485 F.2d 1213 (2d Cir.), cert. den. 417 U.S. 950 (1974), is similarly misplaced. Unlike here, the agent in Rosner expressed great reluctance to have any dealings with the defendant. More importantly, the items supplied by the agent to the defendant were not contraband, but rather "3500 material" which the defendant would have been entitled to get upon the trial of the case.

** The issue of whether supplying contraband constitutes entrapment under Russell is presently before the Supreme Court in Hampton v. United States, supra.

*** While the informer began receiving a salary of $210 in February, 1975, his work was "reviewed" every month based on whether he had "successfully co-operat[ed]" with the DEA. Moreover, he continued to receive "bonuses" when he was especially "successful." Thus, the essence of a contingent fee arrangement remained in effect through the time of the events in this case. This conclusion appeared to be conceded by the Government at trial when the prosecutor told the jury that the informer was a "paid headhunter."

because it may provide an independent basis for finding impermissible Government activity regardless of appellant's predisposition. Williamson v. United States, supra.; See also, United States v. Smith, 508 F.2d 1157, 1170 n.5 (7th Cir.) (Swygert, J., dissenting), cert. den. 421 U.S. 980 (1975); United States v. Curry, 284 F. Supp. 458, 470 (N.D.Ill. 1968). But see, United States v. Grimes, 438 F.2d 391, 394-396 (6th Cir), cert. den. 402 U.S. 989 (1971).

In Williamson, the Fifth Circuit held that a contingent fee agreement with an informer to produce evidence against particular defendants as to crimes not yet committed was intolerable and required the reversal of the conviction, at least where, as here, there was no showing that the Government knew the defendants were engaged in a course of illegal activity and that the informer had been instructed on the rules of entrapment. This Circuit has never expressly rejected the proposition that Williamson stands for. United States v. Archer, supra, 486 F.2d at 677 n.6; United States v. Cuomo, 479 F.2d 688 (2d Cir.), cert den. 414 U.S. 1002 (1973); United States v. Smalls, 363 F.2d 417 (2d Cir.), cert. den. 385 U.S. 1027 (1967).

While it may be true that the informer here was not paid to produce evidence against appellant, in particular [United States v. Cuomo, supra, 479 F.2d at 692], the absence of this factor, which under Williamson might otherwise justify a reversal based on the contingency fee agreement alone, is more than

made up for by the fact that it was the informer in this case who, in effect, supplied appellant with the narcotics.

It is this combination of factors, i.e., a Government informer supplying contraband to a previously uninvolved or minimally involved defendant, while paid on a contingency fee basis, which distinguishes this case from Russell and should have resulted in a judgment of acquittal. Cf., United States v. Silva, 180 F. Supp. 557 (S.D.N.Y. 1959) (Weinfeld, J.). Whether this combination constitutes a denial of due process [United States v. Russell, supra, 411 U.S. 431], a "variant" of entrapment as a matter of law [United States v. Minichiello, 510 F.2d 576, 577 (5th Cir. 1975); United States v. Bueno, supra], or intolerable Government conduct calling for the exercise of this Court's supervisory power [Williamson v. United States, supra], it is sufficiently outrageous conduct regardless of appellant's propensity to commit the immediate offense to warrant a reversal of his conviction.

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED AND, FOR THE REASONS STATED IN POINT V, THE INDICTMENT DISMISSED OR, IN THE ALTERNATIVE, FOR THE REASONS STATED IN POINTS I, II, III, AND IV, A NEW TRIAL ORDERED.

Respectfully submitted,

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Certificate of Service

January 28, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

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